Supreme Court of the United States

OCTOBER TERM, 1938.

No. 31

THE SOVEREIGN CAMP OF THE WOODMEN OF THE WORLD, A CORPORATION, PETITIONER,

vs.

WILLIAM F. BOLIN, EDWARD E. BOLIN, SAMUEL A. BOLIN, ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI TO THE KANSAS CITY COURT OF APPEALS OF THE STATE OF MISSOURI.

PETITIONER'S REPLY BRIEF

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Petitioner offers these suggestions in reply to respondents' argument with the hope that they will lighten the work of the Court. Our answer will be in the fewest possible words.

Point A, page 11, Respondents' Brief.

Respondents assert that the judgment of the state court rests upon at least four independent grounds not in-

volving a federal question and each of which is adequate to support the judgment, and cite *Arkansas S. R. Co.* v. *Bank*, 207 U. S. 270. This we deny. We agree with the pronouncements of the Arkansas case, but deny its application here. The constitutional issue is the only question in this case. We shall attempt to show later that each of the "four independent grounds" mentioned were independent denials of the full faith and credit provision. We will treat most briefly each of said "four grounds" in the order set out.

(a), page 12, Respondent's Brief

The first independent ground upon which respondents stand is that the operation of the constitutional mandate may be arrested by application of the Missouri rule of estoppel.

The court below so held. Since the Nebraska law was applicable to the controversy between the parties under the faith and credit provision of the Constitution, the application of the Missouri law was violative of the constitutional provision. This thought is treated under Point (e), page 45, and Point (g), page 49, Petitioner's Brief.

To sustain the proposition that the Federal Constitution can be annuled by a local plea of estoppel, respondents cite, on page 12 of their brief, seven cases in none of which (except *Rechow* v. *Bankers' Life*, which is against respondent) was the Federal Constitution involved.

Evidently counsel for respondents confuse the application of the Missouri law of estoppel as applied to mere conflict of law cases with its application to a constitutional ques-

tion, as all of the cases cited, except as above stated, were conflict of laws cases, with perhaps one exception where the full faith and credit provision was improperly pleaded in a mere conflict of laws case. No case is cited in respondents' brief which supports the doctrine that the local rule of estoppel is applicable where the Federal Constitution is involved as here.

This court has recognized the proposition that where the constitutional mandate requires that full faith and credit be accorded a decision of a foreign state, as contended for here, it would be a denial of such provision for a state to interpose its own law of estoppel and refuse to give said decision the same force and effect as it has at home.

On page 13 of respondents' brief is cited *Enterprise Irrigation Dist. et al.* v. *Farmers Mutual Canal Co. et al.*, 243 U. S. 157. That case is not applicable here. Dissecting it in the briefest way:

(a) No question of full faith and credit was involved.

(b) The law of Nebraska was applicable and the question of estoppel was decided under the Nebraska law.

(c) The constitutional question involved (not full faith and credit) was waived.

Counsel leaves the thought that petitioner is pleading *ultra vires* to escape from a bad bargain.

It is true the certificate called for an actuarial impossibility. Ninety cents a month will not furnish protection of $1100.00 every day for 20 years and at the end of that period accumulate a reserve of $1100.00. Ninety cents a

month for 20 years is $216.00. No actuarial rule is elastic enough to stretch that figure to meet the situation.

But the inadequacy of assessments is as distantly related to the constitutional issue as are Arcturus and his sons.

If by-law 82 had not been held void *ab initio*, petitioner must have had recourse in bankruptcy, not the Constitution.

(b), page 13, Respondents' Brief

Respondents assert that the second ground supporting the judgment was that the certificate was subject to the general insurance laws of Missouri because at the time it was issued petitioner had no license to do a fraternal business in Missouri; that this fact converted the contract into an old line policy and because it was old line the Missouri insurance laws alone were applicable.

We are not in accord with respondents. The application of the Missouri law was of itself a denial of the constitutional provision. We have treated this point under Point (g), page 49 of Petitioner's Brief. We shall not reiterate, except to say that while no license was required and there was no way by which one could be procured, the question of license or no license is immaterial.

On page 14 of Respondents' Brief are cited seven cases to the effect that a fraternal society operating in Missouri without a license cannot claim the exemptions and benefits of the fraternal statutes. With this we agree, but at no stage of the proceeding has petitioner claimed any rights or benefits under the statutes of Missouri either fraternal

or old line. It claimed that the rights of the parties were fixed by the charter as interpreted by the domiciliary court. All along petitioner has insisted that the Nebraska decision was an interpretation of its charter and was a denial of its authority to issue the contract (the marginal note); that petitioner having no authority to issue the contract, it is immaterial what label is placed upon it.

On page 15 Respondents cite four cases. In none of which was the full faith and credit question involved. These were cases upholding the constitutionality of the Missouri insurance law under the due process clause and the equal protection clause of the Constitution. In all of those cases the policy of insurance had been issued to, and had been accepted by, a resident of Missouri and was therefore, a Missouri contract governed by the laws of Missouri. They in no way related to the full faith and credit issue before us. In pressing the above cases counsel have evidently overlooked the distinction between membership in a fraternal order, the rights incident to it and the relationship between an insurance company and the holders of an ordinary policy.

In *Haner* v. *Grand Lodge,* 102 Neb. 563, 566, the court said:

> "Plaintiff as a member of the association was a party to the adoption of this by-law. He does not stand in the same relation to the association as does the holder of a policy in a standard life insurance company, but occupies the dual position of insurer and insured."

This distinction is clearly stated in *Modern Woodmen of America* v. *Mixer,* 267 U. S. 544, 551, where Mr. Justice Holmes said:

"The act of becoming a member is something more than a contract, it is entering into a complex and abiding relation, and as marriage looks to domicile, membership looks to and must be governed by the law of the state granting the incorporation."

If an old line policy of insurance is issued and accepted in a foreign state, the laws of such foreign state become a part of the contract, and if a suit were brought in Missouri on such policy, the laws of Missouri could not be applied to the construction of the policy (in lieu of such foreign laws) as such application would be a denial of full faith and credit. It would be a substitution of the laws of Missouri in place of the laws of such foreign state and would alter the rights, duties and responsibilities of the parties.

Aetna Life Ins. Co. v. *Dunken*, 266 U. S. 389.
John Hancock Mutual Life Ins. v. *Yates*, 299 U. S. 178.

That well established rule is applicable here. The laws of Nebraska govern the controversy between the parties; hence, the laws of Missouri were inapplicable (see Point (a), p. 18, Petitioner's Brief.) We repeat: The application of the Missouri law and the refusal to apply the Nebraska laws changed the substantive rights of the parties and was a denial of the full faith and credit provision of the Constitution.

(c), page 15, Respondents' Brief

Respondents assert that the third independent ground supporting the judgment was that the certificate was delivered to and accepted by Bolin in the State of Mis-

souri; that all assessments were paid in Missouri, and that, therefore, it was a Missouri contract to be governed solely by the laws of Missouri regardless of the Nebraska decisions and the Federal Constitution. To boil it down—Missouri law for Missouri contracts.

In its last analysis this is secession, and if all the states followed it, Section 1, Article IV, of the Federal Constitution would go out the window; *Royal Arcanum* v. *Green* would become sounding brass; *Modern Woodmen* v. *Mixer* would become a tinkling cymbal, and fraternal insurance societies would fold their tents like the Arabs.

A fraternal society lives, moves and has its being in mutuality among members. It has but one charter but its certificates are scattered all over the nation. The rights of the members do not hang upon the rules of the parish in which they happen to live, but upon the fundamental laws of the society as construed by the domicilary court. To put it in the briefest way—members rights are determined by the Charter, not by geography. Such rights are mutual, uniform—the same everywhere. The Federal Constitution, like the law of gravity, is impartial, universal and omnipresent, and, I might add, obtains in Missouri. Parochial zeal cannot annul it. The decisions of this Court (p. 14, Petitioner's Brief) settle this case.

(d), page 16, Respondents' Brief

Respondents insist that the fourth ground, independent of the constitutional question, supporting the judgment is that the certificate is a Missouri contract and the rights

of the assured cannot be materially changed by subsequently enacted by-laws or statutes.

Petitioner does not now, claim, and has never claimed, any rights under any after-enacted by-law or after-enacted statute. Respondent's claim is as far removed from the issue as the East is from the West. Petitioner is standing flatly on the proposition that the society had no authority under is charter to issue the contract; that by-law 82 and the marginal note have been held to be void *ab initio* and *ultra vires*. It is true the record shows that in 1899 the membership saw their error in enacting by-law 82; they saw bankruptcy just around the corner and repealed the offending by-law, but this repeal is wholly unrelated to the constitutional question. Although it is immaterial, we will add that the by-law being void *ad initio* conferred no rights to the members and the repeal took away none.

We think that each of the "four grounds" is a denial of the full faith and credit provision. The first and only issue here is the constitutional question. That issue being present the "four grounds" are absent.

B. (a) page 17, Respondents' Brief

The record (7-16) shows that the constitutional question was properly pleaded and that it was pressed at every opportunity. Without receding from this pronouncement; it is a well-established rule of this Court that it is immaterial whether or not a Federal question is raised in the trial court if it was passed upon by the state appellate court adversely to the contention of the party asserting it.

In *Home Insurance Company* v. *Dick,* 281 U. S. 397, 407, it was said:

> "That the federal questions were not raised in the trial court is immaterial. For the Court of Civil Appeals and the Supreme Court of the state considered the questions as properly raised in the appellate proceedings and passed on them adversely to the federal claim."

In *Cissna* v. *State of Tennessee,* 246 U. S. 289, the court repeated the doctrine as follows:

> "But if the Supreme Court of the state treated * * * them adversely to plaintiff in error and could not have otherwise reached the result it did reach, it becomes immaterial to consider how they were raised."

(b), page 17, Respondents' Brief

Under this caption respondents say that the Trapp judgment is not binding upon the courts of Missouri because it was not rendered in a class suit. We answer: The Trapp judgment was binding upon the courts of Missouri because:

1. It was rendered in a class suit in which Bolin was represented either by Trapp or by the society, and

2. It was a judicial interpretation under the Nebraska law of petitioner's charter (Point (d), p. 41, petitioner's brief).

Under Point (c), page 34 of petitioner's brief, we discussed the effect of the Trapp judgment as one rendered in a suit in which all members of the society were represented by its presence in the litigation. We shall

not reiterate, but beg to treat very briefly the six reasons assigned by counsel (p. 19) why the Trapp judgment should not be accorded faith and credit:

(1) The fact that no right of action existed on the instant certificate at the time of the filing of the Trapp suit is of no significance when we consider that the basic issue in the Trapp case (as in this case) was the obligation of members to continue to pay assessments into the "beneficiary fund." At the time the Trapp suit was filed, Bolin was obligated to pay assessments to keep his certificate in force and the question decided in the Trapp case was whether or not he and others similarly situated would be compelled to continue to do so after the expiration of the "payment to cease" period.

In principle the same contention was made in *Hartford Life Insurance Co.* v. *Ibs*, 237 U. S. 662, 673, where it was said:

> "But the defendant's contention that the policy had lapsed, because of the failure of Ibs to pay the assessment, and the plaintiff's reply that the assessment was void because the mortuary fund was sufficient to meet Call 127, raised an issue as to the right of the insurance company to levy the assessment. On that issue the Connecticut decree was admissible, since it adjudged that the company had the right to make advances to pay claims and could subsequently collect the amount of such claims by an assessment levied as in the present case."

The issue in the Trapp case and the issue in the instant case are identical.

Question: Were all members everywhere required to continue the payment of assessments to keep the one-

ficiary fund intact and their certificates in effect? The Trapp case answers that question in the affirmative. This being true, it is immaterial that in the Trapp case the "payments to cease" period had expired a few months prior to that in the instant certificate.

(2) As pointed out under point (b), page 30, petitioner's brief, Trapp instituted the suit for and on behalf of himself and all others similarly situated. In the answer filed by the society in the Trapp case (R. 88) is the following:

> "Whereby this defendant states that if the plaintiff and others holding similar certificates should be permitted to continue said insurance certificates in force without the payment of assessment after the expiration of twenty years, it would result that the other members of said Order who did not hold such certificates would be compelled to pay the death losses for the members holding so-called 'payments to cease' policies * * *"

It is thus apparent that both Trapp and the society believed they were, and really were, litigating a suit which would be binding upon all members of the society wherever located.

In order to invoke the Trapp decision, it was not necessary to plead and prove that Bolin was represented in the Trapp suit. Under the decisions of this Court and also of the courts of Nebraska the presence of the society in the litigation was sufficient to bind all members of the controversy actually involved a subject matter common to all. The question of the continuous payment of assessments was certainly a subject common to all (Point (c), p. 34, petitioner's brief).

(3) Of course, the insurance laws of Missouri were not involved and could not have been involved in the Trapp case, but that fact does not affect the binding effect of the Trapp judgment. The insurance laws of Missouri could not constitutionally be applied to determine the rights of any member to participate in the beneficiary fund or the corresponding duty to pay assessments. Those were matters controlled wholly by the laws of Nebraska (Point (a), p. 18 and Point (g), p. 49, petitioner's brief).

(4) Able counsels' assertion that "there was no plea (in the Trapp case) sufficient under the Nebraska law to raise the issue of estoppel" is a vagrant statement without visible means of support. As stated, the Trapp petition and the instant petition were substantially the same and the pleas of estoppel were likewise substantially the same. The Nebraska court held that it was concluded as to every issue by its previous decision in the Haner case. In the Haner case the question of estoppel was directly before the court and was denied. Since the question of estoppel was an issue in both the Haner and Trapp cases and since there was no question of sufficiency of the pleadings in either case, one cannot escape the conclusion that the question of estoppel was decided adversely to Trapp.

(5) The fact that the Trapp suit was to compel the society to issue a paid-up certificate and the instant case is one to recover the benefit under a certificate does not affect the binding effect of the Trapp judgment as to issues actually decided.

The exact contention made by counsel for respondents was made in the case of *Hartford Life Insurance Company*

v. *Ibs, supra,* where this Court in deciding the question adversely to the contention of respondents said (l. c. 673):

> "For 'even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remained unmodified.' *Southern Pacific Co.* v. *United States,* 168 U. S. 48-49. So also it was held in *Forsyth* v. *Hammond* (166 U. S. 518), that 'though the form and causes of action be different, a decision by a court of competent jurisdiction in respect to any essential fact or question in the one action is conclusive between the parties in all subsequent actions.'"

As heretofore pointed out, the basic question in the Trapp case, as here, was the validity of Section 82 and the limited payment provision of the certificate under the charter of the society. That issue was directly decided in the Trapp case under the Nebraska law then in force.

The resolution of petitioner's Executive Council, referred to by counsel for respondents, later became Section 82, the validity of which is involved in the instant case (R. 12, 13). The Supreme Court of Nebraska did not consider the Trapp case based upon the resolution as such, but considered the case as based upon Section 82 of the by-laws of the society. This is indicated by the following language of the opinion (R. 93):

> "This is an action in equity brought by plaintiff to compel defendant, a fraternal beneficiary society, to issue and deliver to him a paid up policy in the sum of $2,000, under the provisions of a by-law of defendant in force at the time the plaintiff became a

member of the society. The by-law provided that every person joining the society, after reaching the age of 42 years and remaining a member thereof in good standing for a term of 20 years 'shall not thereafter be required to pay any assessment or dues and shall receive a paid up certificate, payable at death to his designated beneficiary.'"

It was not necessary to show that Pleasant Bolin had any actual knowledge of the Trapp litigation, or that he acquiesced in being represented either by Trapp or by the society. It is sufficient if he was at that time a member of the society and the litigation involved a subject matter which affected his rights and the rights of other members in the "beneficiary fund" established and maintained for the benefit of all the members.

(6) What has been said under Point (c), page 34 of petitioner's brief, is sufficient to dispose of the contention made by respondents that the Trapp judgment was not binding upon certificate holders residing in Missouri.

The case of Old Wayne Mutual Life Association v. *McDonough, et al.*, 204 U. S. 8, cited by respondents to sustain their position was an action brought in Indiana on a judgment obtained against the insurance association in Pennsylvania under a Pennsylvania statute providing in substance for service upon foreign insurance companies doing business in the state by service upon the Secretary of State. It was contended in the Indiana courts that the Pennsylvania court was without jurisdiction to render a judgment against the insurance association for the reason that the insurance association was not at any time doing business in the State of Pennsylvania so as to render it amenable to substituted service of process

and that the Indiana courts were not bound to give full faith and credit to a Pennsylvania judgment rendered in that manner. This Court upheld the Indiana court, holding that the full faith and credit provision required the foreign court to give only such effect to the judgment as would be given to it by law or usage at home, and since the Pennsylvania court was without jurisdiction to render the judgment against the insurance association, it was void and of no effect either in Pennsylvania or in Indiana.

There was no pretense that the case was a class suit and that the association was bound by the Pennsylvania judgment because it was bound as a member of a class. The only question involved in that case was whether or not the requirements of due process had been met and it was rightly held that they had not.

(c) page 21, Respondents' Brief

It is true that there were no questions under the Missouri law involved in the Trapp litigation, but, as heretofore pointed out, since petitioner was a Nebraska association and Bolin was a member thereof, the relationship between them was governed exclusively by the laws of that state and the application of the Missouri law is of itself a denial of full faith and credit.

Cole v. *Cunningham, et al.*, 133 U. S. 107, cited by respondents on page 21 of respondents' brief, was a case where the Massachusetts court having jurisdiction of insolvency proceedings, enjoined residents of Massachusetts from attaching an insolvent debtor's property in New York and thereby evading the insolvency laws and the effect of the decree of the court of Massachusetts. It was held by

this Court that the order of the Massachusetts court did not violate the full faith and credit provision of the Constitution and did not amount to an extra-territorial application of the Massachusetts law. Clearly, this case has no bearing on the instant case.

The remainder of the cases cited at the bottom of page 21 of respondents' brief are all cases where it was held in substance that a judgment rendered in a former suit is not binding in a subsequent suit between the same parties where the two suits involved different issues. We do not dispute the correctness of these cases, but they clearly have no application here.

(d) page 22, Respondents' Brief

It has never before been contended by respondents in the instant case that the respondents were denied rights under the due process clause of the Constitution, and certainly, the case of *American Surety Company* v. *Baldwin*, 287 U. S. 156, does not sustain the contention.

In that case the surety company had executed a supersedeas bond and after the judgment appealed from had been affirmed, judgment was, on motion of the prevailing party and without notice entered against the surety company.

The proceeding was pending in Idaho and under its laws the surety company, after a summary judgment had been entered against it, was entitled to be heard, and upon such hearings, it was held that the court had jurisdiction to render the judgment. This Court held that the surety company had not been denied its right under the due

process clause of the Constitution; that it had asserted its rights in the courts of Idaho, had been afforded a hearing, thus being afforded due process under the Constitution.

C, page 22, Respondents' Brief

Section 82 and the limited payment provision of the beneficiary certificate were not void by reason of any after-enacted statute of Nebraska and, therefore, the contract clause of the constitution is not involved. They were void under the charter of the society which necessarily existed prior to the issuance of the benefit certificate.

The argument made by counsel for respondents can be disposed of briefly by pointing out that the Trapp certificate was issued when the laws of Nebraska of 1887 pleaded in petitioner's answer (R. 9) and introduced in evidence (R. 67) were in effect. It was not contended in the Trapp case nor is it contended in this case that Section 82 and the limited payment provision of the beneficiary certificate were void by reason of any statute.

They were void under the charter of the society because under its articles of incorporation it had no power or authority to issue such certificates as were involved in the Trapp case or in the instant case. The Trapp decision followed the Haner decision only in principle.

Counsel argue that because the Haner case was decided under the laws of 1897 of Nebraska, it follows that the Trapp case likewise predicated its decision under those laws. Counsel's assumption rests upon the further assumption that the Supreme Court of Nebraska, in deciding the Trapp case, did not know what it was doing. The court

applied to the Trapp case the principles of the Haner case. They of course, construed the charter in the light of the proper statutes which were those in force and effect at the date of the certificate, which were the ones pleaded here.

D, page 24 Respondents' Brief

The decisions of this Court relied upon by petitioner are not distinguishable from the instant case.

Counsel for respondent seeks to distinguish the cases of *Supreme Council of the Royal Arcanum* v. *Green, Modern Woodmen of America* v. *Mixer, Hartford Life Ins. Co.* v. *Ibs, Hartford Life Ins. Co.* v. *Barber,* and the cases dealing with the relationship between a corporation and its members in insolvency proceedings, on the ground that in all of those cases the internal affairs of the corporation and its relationship to its members are dealt with, where, in the instant case the controversy arises under a separate and independent contract between the society "and another party." Counsel overlooks the fact that the so-called separate and independent contract is but a document evidencing membership in a fraternal order, that no one but a member of the order could hold that document, and that the "other party" referred to by counsel was a member of the society.

All of the rights under the so-called separate and independent contract were necessarily dependent upon the charter and by-laws of the society, just as the rights of any member of any corporate body are dependent upon the charter and by-laws of the corporation.

Counsel for respondent contend that the Steen case, on which the decision of this Court in the Mixer case was

based, was merely a precedent, and not a conclusive judgment as to the remaining members of the association. If that were true, this Court would not have taken jurisdiction of the Mixer case. This Court granted the writ because of the Constitutional question. The Mixer case has been cited hundreds of times on the constitutional point.

The cases cited on page 28 of respondents' brief to sustain its contention that petitioner was estopped to assert the invalidity of Section 82 and the limited payment provision of the beneficiary certificate are clearly not in point. In none of those cases was estoppel sustained to deny a party a substantive right where the Constitution requires recognition of that right. In all of them the only question involved was whether the party, by his conduct, had waived his right or was estopped to assert a constitutional right which was conceded to be his in the absence of waiver or estoppel.

Petitioner prays that the judgment and decision of the Kansas City Court of Appeals be reversed.

Respectfully submitted,

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